

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN K. SMITH)	
Claimant)	
VS.)	
)	Docket No. 1,048,115
USC, LLC)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Matthew L. Bretz requested review of the May 16, 2012, Order on Motion on Apportionment of Attorney Fees (Order) of Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on September 5, 2012.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence Kansas, represents respondent and its insurance carrier. Due the retirement of Board Member David A. Shufelt, Joseph Seiwert, of Wichita, Kansas, has been appointed as a Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found that Bretz Law Firm (Bretz) and Mitchell W. Rice should split the allotted \$10,700.00 in attorney fees, 50/50 awarding \$5,350 to each. The ALJ found that Bretz should be paid \$3,041.16 in expenses, and directed Mr. Rice to

pay \$1,009 to Dr. Pratt out of the \$5,000 that was withheld for expenses. Any amount leftover is to be paid to the claimant. Finally, Bretz was directed to reimburse Mann Law Office (Mann) \$187.50 in copying costs incurred to copy claimant's file. In the Order the ALJ determined that the contract which prohibited the assessment of any attorney fee on the first \$17,200.00 recovered was the agreement to be enforced in this matter.

Mr. Bretz argues that the Board should find that Bretz has contributed to materially advance the claimant's claims and has earned 100 percent of the fees in this case as well as the expenses identified in Exhibit 8.

Mr. Rice argues that Bretz is only entitled to a reasonable value of the services rendered based upon *quantum meruit*. Mr. Rice requests that the Board determine which of the two different fee agreements with Bretz controls and then determine the value of Bretz's expenses to be charged to the claimant.

Finally, claimant contends that both attorneys are bound by the original contract, which excludes \$17,200.00 from the calculation of the attorney fees due in this matter. Bretz argues that contract is not their standard contract and must have been the result of a mistake, and claimant should not be allowed to take advantage of that mistake. Rice argues that both he and Bretz are bound by the terms of the original contract.

FINDINGS OF FACT

On October 27, 2009, claimant retained the services of the Bretz Law Offices to represent him in his worker's compensation claim against respondent, USC, LLC. Claimant testified that when he agreed to have Bretz represent him, he was emailed paperwork to fill out. He filled out a document titled "Attorney-Client Agreement for Workmen's Compensation", retaining the original and faxing a copy back to Bretz. On that same day claimant received a second contract, titled the same, dated the same and appearing similar to the original contract. However, one very dramatic difference was apparent on the contracts. One contract stated that there would be no attorney fees taken on the first \$17,200.00 of any net recovery. The other contract did not exclude the first \$17,200.00 from the deduction of attorney fees. Both contracts were dated October 27, 2009, and were signed by claimant and returned to Bretz.

Throughout the litigation of this matter claimant was represented by attorney Mitchell W. Rice. An Award, granting claimant \$91,163.73 was issued on March 1, 2011. The Award was appealed to the Board and was affirmed by the Board on July 27, 2011. Mr. Rice's employment with Bretz was terminated on March 15, 2011. On March 21, 2011, Mr. Rice, having accepted employment with Mann Law Offices, contacted claimant, offering him the choice of remaining with Bretz or retaining Mr. Rice as his attorney. Claimant chose to retain Mr. Rice as his attorney in this matter. A new contract was sent to claimant in April 2011, but was not signed by claimant. Bretz filed a "Notice Of Attorney

Fee Lien” with the Division on March 30, 2011, requesting 25 percent of any future award and expenses as detailed on the attachment to the Notice.

On September 15, 2011, claimant, while being represented by Mr. Rice, settled his case for a lump sum of \$60,000.00. A document entitled “Settlement Authorization” was signed by claimant on September 28, 2011, detailing the amount and breakdown of the settlement. On that same date, an attorney fee agreement was also signed by claimant, with Mann. However, that agreement did not exclude the first \$17,200.00 from the attorney fee agreement. Claimant, at first declined to sign the attorney client agreement because it was different from the one he originally signed with Bretz. It was claimant’s understanding that Mr. Rice was going to honor the same agreement he had with Bretz. Mr. Rice was not aware of this agreement with Bretz as he had not seen the agreement prior to this time. But he and claimant agreed to go with whatever agreement claimant originally had with Bretz.¹ The new fee agreement with Mann indicated that the firm would get the first 25 percent of any award obtained on claimant’s behalf. Claimant signed the agreement and sent it back to Mr. Rice, although with a caveat requesting the terms of the original contract signed with Bretz.

Vickie Lohmeyer, bookkeeper and paralegal for Bretz, testified that she has worked for the firm for 6 years and has performed paralegal work for about 4 1/2 of those years. Ms. Lohmeyer testified that in 2009 she sent some new client forms to claimant by email and mail. The forms sent included a fee contract, medical authorization, workers compensation accident questionnaire and a form that gets filed with the state. Ms. Lohmeyer testified that these are generic forms and every new client gets them.

Ms. Lohmeyer’s duties as bookkeeper are to pay the bills as they come in and to go through the time slips to put together expense reports for the client. Ms. Lohmeyer testified that bills from court reporters take about four to six weeks to come in and that is why the money received is held for a while, to make sure those expenses get paid. She confirmed that there are times where a claim is settled, and the proceeds received and are paid out to the client and lienholders before a bill from someone who has worked on the file or provided records or a deposition or some other expense comes in.² In those instances the firm will pay those bills out of its own pocket. Ms. Lohmeyer testified that in claimant’s case it took 11 months for Dr. Pratt to submit his bill for his December 21, 2010 deposition. And, because the firm was no longer representing claimant at the time the bill came in, the firm declined to pay the bill. Everything else in the expense itemization looked to be in order. The ALJ ordered the Dr. Pratt bill to be paid out of the \$5,000.00 withheld from the settlement.

¹ M.H. Trans. at 9-10.

² M.H. Trans. at 53-54.

Mitchell Rice testified that he had a fee agreement with the claimant prior to the settlement in September 2011. He testified that his agreement with claimant and Scott Mann came after the settlement and ended up being the same agreement that was made with him and Bretz because that is what claimant would agree to. It was not however the standard 25 percent agreement.

Mr. Rice testified that Mann sent claimant a fee agreement on two occasions. The first time was in April 2011 and the second time in September 2011. He testified that he doesn't know how claimant ended up with a fee agreement with Bretz waiving fees for the first \$17,200, but he doesn't believe that claimant altered it. He believes it was an error by Bretz.

Mr. Rice testified that although claimant won his appeal and was awarded over \$91,000 by the ALJ and affirmed by the Board, he settled his case for \$60,000. The reason given for the reduced settlement was, in part, because there was a threat of an appeal to the Court of Appeals and claimant had unexplained financial concerns. Additionally, it was argued that claimant was not completely comfortable with a provision that he would not be able to return to work and claimant wanted to work.³

Even though Mr. Rice performed a majority of the work on claimant's claim while at Bretz, he suggested an equal split of the fees with Bretz. In support of his position, Bretz submitted an attached time list showing a total of 78.8 hours being spent in the litigation of this matter. Mr. Rice submitted an attached time list, indicating that he spent 22.9 hours working on the file since leaving Bretz and estimated he spent a total of 30 hours on the file while at Bretz. Bretz's time appears to include legal assistant time, while Mr. Rice included only attorney time. Mr. Rice disputes the accuracy of the time Bretz estimated that Rice spent on the file while working for Bretz.

The Board notes that the greatest amount of time was spent while the matter was with Bretz. Although Mr. Rice was the attorney representing claimant, he was being compensated by Bretz. Furthermore, it appears that the greatest amount of value was created while the file was being handled when Rice was with the Bretz firm. The Board finds that Bretz is entitled to 75 percent of the assessed attorney fees and Mr. Rice, with Mann, is entitled to 25 percent.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-536(a)(b)(h) states:

(a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in

³ This last attempted justification was not explained and is not completely clear to the Board.

connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in K.S.A. 44-510c and amendments thereto.

(b) All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents, which shall be subject to approval by the director in accordance with this section. Every attorney, whether the disposition of the original claim is by agreement, settlement, award, judgment or otherwise, shall file the attorney contract with the director for review in accordance with this section. The director shall review each such contract and the fees claimed thereunder as provided in this section and shall approve such contract and fees only if both are in accordance with all provisions of this section. Any claims for attorney fees not in excess of the limits provided in this section and approved by the director shall be enforceable as a lien on the compensation due or to become due. The director shall specifically and individually review each claim of an attorney for services rendered under the workers compensation act in each case of a settlement agreement under K.S.A. 44-521 and amendments thereto or a lump-sum payment under K.S.A. 44-531 and amendments thereto as to the reasonableness thereof. In reviewing the reasonableness of such claims for attorney fees, the director shall consider the other provisions of this section and the following:

(1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney; the employer shall attach to the settlement worksheet copies of any written offers of settlement which were sent to the employee before the employer was aware that the employee had hired an attorney;

(2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

(3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;

(4) the fee customarily charged in the locality for similar legal services;

(5) the amount of compensation involved and the results obtained;

(6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;

(7) the nature and length of the professional relationship with the employee or the employee's dependents; and

(8) the experience, reputation and ability of the attorney or attorneys performing the services.

. . . .

(h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

The typical attorney fee dispute between two attorneys usually does not involve the claimant. However, a part of this fee dispute is unique in that it does affect claimant's share of the overall award. A contract dispute also generally does not involve differing versions of the required attorney fee contract in workers compensation litigation. This dispute is unique in that regard. The primary rule in interpreting written contracts is to ascertain the intent of the parties. If the terms of the contract are clear, there is no room for rules of construction, and the intent of the parties is determined from the contract itself.⁴ In construing contracts, an ambiguity in the language of the contract will be strictly construed against the party who drafted the provision.⁵

Here, the language of the two contracts is clear. However, it is the existence of the two differing versions which creates the ambiguity or uncertainty. Neither Bretz nor Rice allege that claimant, in some way, altered the contract, or substituted a differing version of the attorney fee contract. Bretz alleges a mistake in the creation of the contract, but provides no explanation for that alleged mistake. Rice contends that Bretz is bound by the original contract, in favor of claimant. Claimant testified to receiving both versions of the contract on the same day, signing and returning both versions, one by fax and one by U.S. mail. Claimant naturally seeks to enforce the more favorable version, thus omitting attorney fees on \$17,200.00 of the total recovery.

In this instance, the ambiguity exists, not in the terms of a single contract, but rather in the existence of conflicting contracts, created on the same day, by the same law firm. As noted above, ambiguity in the language of a contract will be strictly construed against the drafter of the provision. Likewise, ambiguity created by the existence of two conflicting contracts will be construed against the creating entity. The Board finds that the contract excluding \$17,200.00 from the attorney fee calculation is the proper contract to be enforced. The award of the ALJ on this issue is affirmed.

At the time of the Settlement Authorization, signed by claimant on September 28, 2011, claimant's original award of \$91,163.73 was discounted to a lump sum payment of

⁴ *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 961 P.2d 1213 (1998).

⁵ *Shelter Mut. Ins. Co. v Williams*, 248 Kan. 17, 804 P.2d 1374 (1991).

\$60,000.00. From that, 25 percent or \$15,000.00 was deducted as attorney fees. This settlement does not discuss either the disputed \$17,200.00 or the \$7,742.16 paid in TTD in this matter.

The attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the disability compensation recovered.⁶ Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.⁷

The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.⁸ The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 44-536(b), which specifically includes:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney . . .
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and⁹
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

⁶ See K.S.A. 44-536(a).

⁷ See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

⁸ K.S.A. 44-536(h).

⁹ See Kansas Rules of Professional Conduct (KRPC) 1.5 (Fees) (2010 Kan. Ct. R. Annot. 458).

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.¹⁰

In *Madison*,¹¹ the Kansas Court of Appeals ruled that attorneys who are discharged before the contingency provided in a contingency fee contract may not, generally, recover the contingency fee. Instead, the fees are to be determined based upon the reasonable value of the services the attorney has rendered, or under *quantum meruit*. And in that same opinion, the Kansas Court of Appeals cited both *In re Phelps*¹² and *Shouse v. Consolidated Flour Mills Co.*¹³ as establishing a similar rule when attorneys are discharged before completing the contracted services for stipulated attorney fees.

KRPC 1.6(d) (2010 Kan. Ct. R. Annot. 522) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The Kansas Bar Association (KBA) Legal Ethics Opinion No. 92-5 (July 30, 1992) states in part: "The purpose of [ABA Model Rules of Professional Conduct (MRPC)] 1.16(d) is protection of the client's interests, and the attorney's interests are incidental thereto."

The ALJ split the available attorney fees equally between Bretz and Mann. However, it appears that the greatest amount of work, and the most significant benefit to claimant occurred while the matter was being handled by Bretz. Rice did, however, represent claimant before the Board and during the time leading up to the settlement, while working for Mann. The Board finds that the award of attorney fees should be adjusted to allow 75 percent of the fee to go to Bretz and 25 percent of the fee to go to Rice with the Mann Firm. In all other regards, the Order of the ALJ shall be affirmed.

¹⁰ *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, Syl. ¶ 5, 663 P.2d 663 (1983).

¹¹ *Madison*, 8 Kan. App. 2d at 579. See also *Shamberg, Johnson & Bergman, Ctd. v. Oliver*, 289 Kan. 891, 904, 909, 220 P.3d 333 (2009).

¹² *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970).

¹³ *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award Bretz 75 percent of the assessed attorney fees and Mr. Rice, with Mann, to be paid 25 percent of the assessed attorney fees. In all other regards, the Award of the ALJ is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated May 16, 2012, is modified to award Bretz 75 percent of the attorney fees, and Mr. Rice, with Mann, awarded 25 percent of the attorney fees. In all other regards the Award of the ALJ is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

This Board Member concurs with the majority on the division of attorney fees between Bretz and Mann. However, the undersigned Board Member is sorely tempted not to approve attorney fees for either Bretz or Mann. Bretz did not contemporaneously keep records of the time its attorneys and legal assistants spent providing legal services to claimant. Admittedly, that was the fault of Mr. Rice, who worked for Bretz when it represented claimant and then subsequently handled the claim for Mann. However, from the record it appears that Bretz never kept contemporaneous records of the time it spent on any workers compensation claims it handled. That means when Bretz completes

representation of a client in a workers compensation claim, there is no record available showing the number of hours or the nature of the work spent on the claim.

At the regular hearing, the parties stipulated that Exhibit 4, an itemization of estimated time spent by Bretz' attorneys and legal assistants on the claim would be part of the record. Claimant entered into an attorney fee contract with Bretz on September 28, 2009 (one of two contracts). Mr. Rice was terminated by Bretz on March 15, 2012, which means Exhibit 4 was created some time after that date. Bretz is relying on an estimate created nearly eighteen months after it began representing claimant. Had Bretz kept contemporaneous records of the time its staff spent on this claim, the task of approving and apportioning attorney fees would have been simpler and more accurate.

Two contracts for attorney fees were presented by the parties to the ALJ and the Board for consideration. Both of those contracts were prepared by Bretz. One of the issues was which of the two contracts did the parties enter into? The contracts contained a signature line for the client, but not for Bretz. In order for there to be a valid written contract, both parties must agree to the terms of a contract. The undersigned Board Member does not doubt that Bretz intended on entering into a contract for attorney fees with claimant. The issue of which contract was the one entered into by the parties may never have arisen if Bretz had signed what it considered to be the correct contract.

Little, if any value was added to the claim through Mann's efforts after it began representing claimant. The ALJ had awarded \$91,163.73 in permanent partial disability benefits to claimant during the time Bretz represented claimant. In her Award, the ALJ indicated that as of March 1, 2011, \$22,710.64 of those benefits were due and owing, and the remainder would be paid at the rate of \$321.18 per week. Mann represented claimant before the Board. On July 27, 2011, the Board affirmed the ALJ's Award. Neither party appealed the Board's Order to the Kansas Court of Appeals. Claimant settled the claim on September 15, 2011, for \$60,000.00, plus the \$7,742.16 in temporary total disability benefits already received. Admittedly, it was claimant's decision to settle, and Mann expended time working on the claim. However, the amount for which claimant settled was significantly less than the disability benefits claimant was awarded. By the terms of the settlement, claimant also gave up his right to future medical treatment and review and modification.

When the claim was settled, it does not appear that the Special Administrative Law Judge (SALJ) who heard the settlement required Mann or Bretz to submit a Statement Regarding Attorney Fees (K-WC 160). Neither Bretz nor Mann has filed that form in this claim. No contract for attorney fees was presented at the settlement hearing or approved by the SALJ. Admittedly, claimant was asked at the settlement hearing if he was satisfied with the settlement. Claimant was not asked at the settlement hearing or the hearing to determine the value of Bretz' attorney lien, or if he was satisfied with the services of his attorney. He was never asked if he had any objection to the attorney fees being approved.

Claimant was not asked to review the itemizations of time spent by Bretz or Mann on the claim, or to give his opinion as to whether the itemizations were accurate.

To date, both law firms have provided limited information concerning the factors set out in K.S.A. 44-536(b) that the Director is to consider when determining the reasonableness of attorney fees. One of those factors is the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly. The primary purpose of attorney fee contracts and the factors set out in K.S.A. 44-536 is to protect the injured worker. Here, the issues were which contract was entered into by claimant and Bretz, and the division of attorney fees between Bretz and Mann. Claimant did not appeal whether the \$5,350.00 of attorney fees and costs awarded by the ALJ to Bretz and Mann was reasonable. Therefore, I concur with the result reached by the majority.

BOARD MEMBER

DISSENTING OPINION

I would affirm the ALJ's Order in all respects. Judge Sanders' Order on Motion of Apportionment of Attorneys Fees is 14 pages in length and contains detailed findings of fact, applicable legal principles, and conclusions of law. I find no error in the Order and I see no basis on which to reverse the ALJ's findings and conclusions. Hence, I must respectfully dissent from the opinion of the Board's majority.

BOARD MEMBER

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